

**James Browning's Responses to Follow-Up Questions
of July 15, 2003 from Senator Patrick Leahy:**

1. In a speech to a local chapter of the Federalist Society in 1988, you said, "My premise, which is widely shared, is that the structure of our government—not the Bill of Rights—has provided the greatest bulwark against tyranny. Thus we cannot and should not dismiss structural changes that would preserve and promote federalism and, in turn, civil liberties." Please tell me what kind of "structural changes" you were referring to and think are needed today to "preserve and promote federalism."

1. **RESPONSE:** The point of my talk was that I criticized the Supreme Court's use of the Tenth Amendment in *National League of Cities* (1976) to limit Congress' power under the Commerce Clause. If federalism is a principle worth protecting, as the Supreme Court seemed to believe, it was better protected by changes to the structure of our constitutional government than by the Court creating limitations on Congress' power. The possible structural changes that I suggested for consideration were repeal of the Seventeenth Amendment, election of presidential electors by state legislators, and the election of Senators and Representatives who value federalism as a goal. Also, I do not have a view whether any of these changes are needed today, because some structural changes — such as the repeal of the Seventeenth Amendment — involve a loss of other, competing goals, such as broad participation in the democratic process.

2. In a speech in 1988, before a local chapter of the Federalist Society, you indicated that you believe that the minimum wage is not a national issue that the federal government can address. You said, "If raising the minimum wage \$1.50 an hour in one of the poorest states in the union is a national problem, not a local issue, then we are indeed a society of smoke and mirrors, not substance."

- a. Do you still believe that raising the minimum wage is not something that Congress can regulate under its Commerce Clause power? If so, what is the basis for your view? If not, what made you change your mind?

2a. **RESPONSE:** I did not say nor believe in 1988, and do not believe today, that Congress cannot raise the minimum wage under its Commerce Clause power.

- b. Do you think that Congress can pass laws regulating wages, controlling anti-union discrimination, or other related labor laws consistent with the Constitution?

2b. **RESPONSE:** Yes.

- c. What is your understanding of the scope of congressional power under Article I of the Constitution, in particular, the Commerce Clause?

2c. **RESPONSE:** According to two recent Supreme Court cases, Congress can regulate intrastate economic activity that substantially affects

interstate commerce. See United States v. Lopez (1995); United States v. Morrison (2000).

- d. Last Congress, the House of Representatives passed a bill to prohibit human cloning. Do you see any tension between such legislation and the Court's new restrictions on our powers under the Commerce Clause? In your view, is human cloning more or less "economic" in nature than gun trafficking near schools or gender-motivated crimes of violence?

Id. RESPONSE: I have not read the bill or studied in great detail the Court's recent cases restricting Congress' powers under the Commerce Clause. I thus cannot intelligently comment whether there is a tension. I also have no view on whether human cloning is more or less "economic" than other activities. That determination might well depend on the factual record and evidence developed in a case.

3. Over the past few years, the Supreme Court has struck down a number of federal statutes, most notably several designed to protect the civil rights of Americans, as beyond Congress' power under Section 5 of the Fourteenth Amendment, for example, Flores v. City of Boerne, 117 S. Ct. 2157 (1997), Kimel v. Florida Board of Regents, 120 S. Ct. 631 (2000), and Board of Trustees v. Garrett, 19 S. Ct. 2240 (1999). What is your understanding of the scope of congressional power under Section 5 of the Fourteenth Amendment?

3. RESPONSE: In Flores v. City of Boerne (1997), the Supreme Court struck down the Religious Freedom Restoration Act of 1993 ("RFRA"), acknowledging Congress' broad sweep of power under §5, but holding that the RFRA went beyond that sweep to encroach on a state's right to regulate the health and welfare of its citizens. In Kimel v. Florida Board of Regents (2000), the Court determined that Congress exceeded its authority under §5 by attempting to abrogate Eleventh Amendment immunity under the Age Discrimination in Employment Act. Likewise, in Board of Trustees v. Garrett (2001), the Court held that Congress exceeded its authority by attempting to abrogate Eleventh Amendment immunity in the Americans with Disabilities Act.

4. The New York Times has said that the present Supreme Court has "struck down more Federal laws per year than any Supreme Court in the last half of the century." Are there any federal statutes or sections thereof that have not yet been ruled upon by the Supreme Court that you think go beyond Congress' enumerated powers under the Constitution?

4. RESPONSE: If I am fortunate enough to be confirmed, and a litigant in a case before me challenges a federal statute, I will review the facts, applicable law, and briefs of the parties in an attempt to render a fair decision. I am not aware of any such federal statutes or sections.

5. You have practiced law for twenty years, primarily as a private practitioner, and have litigated many complex cases. However, you state in your Senate Questionnaire that 99% of your litigation experience has involved civil matters and that you have little experience litigating criminal matters. As you know, federal court dockets are overflowing with many complex criminal cases. Please tell the Committee whether and how your experience has prepared you to adjudicate these complex criminal cases and manage a busy docket involving such matters. If you are confirmed, how will you get up to speed and respond to the challenge of handling the criminal matters that will be before you?

5. **RESPONSE:** I have been involved in a number of complex cases involving novel or cutting edge issues that required me to learn quickly and thoroughly entirely new areas of law with which I was not previously familiar. Having handled many complex cases, I believe that experience will be valuable in handling other matters: extensive pretrial motion practice, long trials, jury selection, large numbers of exhibits, and multiple legal issues. Under the Speedy Trial Act, criminal cases take priority. The task is to make no mistakes on calendaring and scheduling matters on the criminal side of the docket, and yet keep the civil cases progressing toward resolution. I believe my handling of class actions and other complex cases simultaneously has given me skills that will transfer to managing a busy docket that includes both civil and criminal cases, some of which will be complex. Through study and hard work, I am confident I will be able to handle the criminal matters that will be before me if I am confirmed.